

PATRICK G. BLUMM
D/B/A RIO GRANDE RAPID TRANSIT

IBLA 90-96

Decided October 31, 1991

Appeal from a decision of the Albuquerque, New Mexico, District Office, Bureau of Land Management, limiting special recreation use permits for conducting river rafting trips. NM SRP No. 81512.

Affirmed.

1. Bureau of Land Management--Public Lands: Special Use Permits--Rules of Practice: Appeals: Generally--Special Use Permits

The regulations governing special recreation permits do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Office adversely affecting a party to a case is subject to immediate appeal to the Board of Land Appeals under 43 CFR 4.410(a).

2. Public Lands: Special Use Permits--Special Use Permits

The issuance of a special recreation use permit is discretionary, and, where necessary to avoid adverse impacts on wildlife, the Bureau of Land Management may restrict use on the Rio Grande River during the period it is revising a management plan for the river, by issuing a limited number of special recreation permits. Where appellant does not show that the authorized officer's decision was unreasonable, the Bureau of Land Management's decision will be affirmed.

APPEARANCES: Patrick G. Blumm, Pilar, New Mexico, pro se; Margaret C. Miller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

On March 27, 1989, Patrick G. Blumm, doing business as Rio Grande Rapid Transit, filed a request with the Taos, New Mexico, Resource Area Office, Bureau of Land Management (BLM), to reserve seven launch dates for the 1989 summer rafting season on the Ute Mountain section of the Rio Grande River, one each week beginning May 27. The Area Office denied Blumm's request by letter decision dated April 13, 1989, stating that "restrictions are indicated by a significant conflict between boating use

and nesting success of the bird life in this section of the Rio Grande." BLM indicated that no launches prior to June 1, 1989, would be allowed and limited Blumm to one launch subsequent to that date, with a possible additional launch subsequent to receipt of a request on an approved form.

On May 15, 1989, Blumm indicated that he wished to appeal the Area Office's decision. BLM did not immediately respond to Blumm's appeal, but instead, on June 30, 1989, issued a letter to Blumm further explaining its reasons for denying his request:

The decision to limit commercial access to this section was based on our concern for the wildlife resources, specifically nesting birds. This is a temporary restriction that will be reconsidered in the revised boating management plan for the River Corridor.

We intend to complete revision of the plan during the 1990 Fiscal Year beginning October 1, 1989. You will have the opportunity to make suggestions and comments on this plan as it is developed.

(Letter of the Area Manager, Taos Resource Area, dated June 30, 1989). The letter concluded by advising Blumm that he could "protest" the decision by forwarding his reasons to the BLM District Office, Albuquerque, New Mexico.

On July 28, 1989, Blumm appealed the Area Manager's decision to the District Manager, Albuquerque, New Mexico, District Office, BLM. Blumm asserted that the Area Manager's decision denying his access to the Ute Mountain section was in direct violation of the established management plan and its amendments, was an attempt to deny the outfitted public its legal and reasonable access to the lands, was a discriminatory decision that jeopardized the future access and establishment of historical use on this segment of the river, and was arbitrary and inconsistent with established BLM policies. He asserted that it adversely impacted the business plans and income of Rio Grande Rapid Transit.

The District Manager responded to each of Blumm's specific allegations by letter decision on September 26, 1989. His decision upheld the Area Manager's determination. Blumm filed a timely notice of appeal to this Board on October 31, 1989.

[1] We note initially that BLM mishandled Blumm's appeal from the Area Manager's decision. As we held in Patrick G. Blumm, 116 IBLA 321, 322 n.1 (1990), the regulations do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. See 43 CFR 8372.6. The Area Office's decision adversely affected Blumm and was therefore subject to immediate appeal to this Board. 43 CFR 4.410. The Area Manager should have notified Blumm of his right to file an immediate, direct appeal of her decision to this Board. Instead, BLM, in effect, created an unofficial intermediate appeal to the District Office. No such procedure is contemplated in the regulations.

Although this procedure was clearly improper, the District Office's subsequent decision was also subject to appeal, so that the matter is properly before us. See Petroleum, Inc., 115 IBLA 188, 190-91 (1990).

[2] Blumm's notice of appeal contends that the District Manager's September 26, 1990, decision did not address his contention that the "Taos BLM actively side-stepped the provisions of the 1984 Management Plan." He further alleges:

In your letter you imply that this was done for environmental reasons, yet in my April and May discussions with the Authorizing Officer and her designated River Ranger, concessions were agreed to which would reduce any threat of a negative impact during the defined critical impact period of May.

* * * The fact that BLM may be changing stipulations in the future does not authorize the agency to disregard present guidelines. The Taos BLM's violations of the management plan had a negative effect upon access to the resource by the general public and specifically by my company.

Blumm further states that "[w]hen the Taos BLM supplies the documents I have requested from it, I will promptly provide you with a complete listing of the reasons for this appeal." The District Manager sent the requested information on November 15, 1989. Blumm has filed no further documents with the Board.

Blumm's principal contention is that BLM acted outside the scope of the 1984 management plan in denying him commercial access to the Ute Mountain section of the river. However, BLM is not required to issue as many permits as that plan suggests. Instead, the issuance of a special use permit is discretionary, and the Department may accept or reject a permit application in furtherance of the objectives, responsibilities, and programs for management of the public lands involved. Four Corners Expeditions, 104 IBLA 122 (1988); Don Hatch River Expeditions, 91 IBLA 291 (1986); see also National Public Lands Task Force, 70 IBLA 214 (1983); Cascade Motorcycle Club, 56 IBLA 134 (1981). The exercise of Secretarial discretion to issue special use permits also includes the authority to set permit conditions. Osprey River Trips, Inc., 83 IBLA 98 (1984).

Regulations at 43 CFR 8372.3 provide for the issuance of special recreation permits at the discretion of the authorized officer. The BLM Manual sets forth at H-8372-1 the methodology by which the authorized officer shall exercise his discretion. The Manual provides that the authorized officer may reduce commercial use either through planning decisions or through an environmental analysis. BLM Manual, H-8372-1.II.E.

The limitation on Blumm's use during the 1989-90 permitting year is supported by an environmental study undertaken by Ron Gardiner, a volunteer who studied the wildlife in the Ute Mountain Region. Gardiner stated in his report at page 67:

Because normal to high water levels and boating are directly related, and because this area currently lacks a boating management program, high water means increased numbers of boaters down the river. The impacts from the mere presence of more people in

the gorge are quite profound, especially during nesting, which tends to be disrupted. Regardless of the quality of boaters and of their awareness, frequency of presence on the river causes nest failure. Most failures occur due to the interruption of brooding during early nesting. Nest cycles are not consistent, even among the same species, so a boating restriction schedule must span the entire possible nesting period.

Gardiner made the following recommendation with respect to boating use in the Ute Mountain section of the river:

Boating use has been dramatically increasing over the past decade. Its current rates are at a pace that cannot be tolerated by raptors and water fowl. Boating unfortunately cannot be evaluated qualitatively but must be judged quantitatively. The spacial qualities of the nesting habitat are such that even the most seemingly unobtrusive presence has a negative impact. Activities as innocent as camping and take-outs flush raptors from brooding and cause nest failure. This area cannot absorb any boating between April 1st and July 15th, and maintain its integrity, its productivity and its historical identity. Boating can resume at a gradual level (1 put-in per week) over the next four weeks, evolving to complete access between August 15th and April 1st. [Emphasis in original.]

(Gardiner's Report at 70). The BLM Resource Area Wildlife Biologist, Ben Kuykendall, concurred with Gardiner's assessment (Apr. 14, 1989, Memorandum to Tom Mottl).

Based upon Gardiner's field study and Kuykendall's recommendation, boating limitations imposed during the 1989 season were more restrictive than those set forth in the 1984 management plan in order to protect sensitive raptor nesting patterns. Nevertheless, the action taken by BLM to cut back use of the Ute Mountain section is not inconsistent with the 1984 Rio Grande Wild and Scenic River Recreation Area Management Plan, even though that plan initially contemplated considerably more use of the section than is now authorized. Final Rio Grande Wild and Scenic River Recreation Area Management Plan, June 1984 at 69. In 1984, wildlife issues (specifically including effects of use on raptorial birds) "were considered not to have significant influence on the development of the management program." Id. at 55, 69. However, the 1984 management plan strongly suggested that such use might be subsequently determined to adversely affect raptorial birds and referred to an ongoing study "to determine the number of raptors in the gorge and how to better protect their habitat." Id. at 55. The plan contemplated that BLM's recreation program specialist would work closely with wildlife specialists "to insure minimal disturbance of raptor habitat through human access and contact." Id. BLM's view of the significance of the issue of protecting raptors has plainly changed since 1984, based on the information developed in the study of raptors, part of which is quoted above. Its decision to restrict use, based on the results of

that study, is consistent with the policy manifested in the 1984 plan that disturbance of raptor habitat be kept to a minimum.

A decision to limit the number of permits to be issued in a particular season is not arbitrary or capricious where it is based on facts assembled from study of use of the river and is a sound effort to protect the environment of the river. Four Corners Expeditions, *supra*; Outdoor Adventures, S.W., 50 IBLA 90, 93 (1980). Appellant has not demonstrated that the decision was arbitrarily reached, that it was in error, or that it was otherwise not within the exercise of reasonable discretion. Acceptance or rejection of an application for a special recreation use permit will be affirmed where the decision is supported by facts of record, in the absence of compelling reasons for modification or reversal. National Public Lands Task Force, *supra* at 216. Appellant has shown no such compelling reason.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals delegated by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge